UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Ohio Valley Insulating Company, Inc.,	)	Docket No. CAA-III-116
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: January 22, 2001
Washington, D.C.

Appearances

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I. Statement of the Case

The United States Environmental Protection Agency ("EPA") brought this enforcement action against the Ohio Valley Insulating Company, Inc. ("OVI"), for an alleged violation of Section 112 of the Clean Air Act (the "Act"). 42 U.S.C. § 7412. EPA alleges that OVI violated Section 112 when, after removing regulated asbestos-containing material ("RACM") during an asbestos abatement job, it failed to ensure that the RACM remained adequately wet until collected for disposal, as is required by 40 C.F.R. 61.145(c)(6)(i).[1]

[1] The term "regulated asbestos-containing material" means "(a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d)

For this single violation, EPA seeks the assessment of a $28,520 civil penalty against OVI.[2] OVI denies that it violated the Clean Air Act and alternatively argues that the penalty sought by EPA is excessive. A hearing on this matter was held on August 24-25, 1999, in Charleston, West Virginia.

Based upon the record evidence, OVI is held to have violated Section 112 of the Clean Air Act as alleged by EPA. A civil penalty of $20,000 is assessed against OVI for this violation.

II. Facts

The events in this case took place at Century's Ravenswood facility, located in Ravenswood, West Virginia. There, Century manufactures aluminum sheet and plate products for sale to industrial concerns. This operation has been described as a "reduction facility and multi-purpose rolling mill." Jt. Ex. 1.

In 1996, Century hired OVI to remove asbestos-containing material from its Ravenswood facility. OVI is a contractor specializing in asbestos abatement. Jt. Ex. 1. Before beginning this asbestos abatement work, OVI filed a "Notification of Abatement, Demolition, or Renovation" with the State of West Virginia. C.Ex. 1.[3] In this notice, OVI stated that it would be removing asbestos-containing material ("ACM") from the facility's E-1 Soaking Pit. The asbestos-containing material to be removed from the Soaking Pit was identified as 2300 square feet of block insulation. OVI filed a second "Notification" with the State (also prior to beginning abatement work) stating that in addition to removing the 2300 square feet of ACM from the E-1 Soaking Pit, it would be removing 500 linear feet of ACM from pipes in the R-1 Bay. C.Ex. 2. The events of this case center upon the asbestos removed from the R-1 Bay. Tr. 422.

Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart." 40 C.F.R. 61.141.

[2] In the complaint, EPA had named Century Aluminum of West Virginia, Inc. ("Century"), as a co-respondent. Century owns the facility where the asbestos removal took place. EPA initially sought a civil penalty of $41,020 from Century and OVI. Prior to the hearing in this case, however, EPA and Century entered into a settlement in which Century agreed to pay a penalty of $12,500. EPA now seeks the remainder of the originally proposed penalty from OVI. Tr. 8.

[3] The abatement notification refers to the Ravenswood Aluminum Corporation as being the facility owner. This is the company name under which Century formerly operated. Jt. Ex. 1.

By all indications, the asbestos abatement work in the R-1 Bay began on November 21, 1996. *See* Jt. Ex. 1. The R-1 Bay is approximately 75 feet in width and 1,600 feet in length. Tr. 432. The abatement work which is the focus of this case involved the removal of pipe covering, approximately 10 inches in diameter, from ceiling pipes located 50-60 feet above the ground. Tr. 422-423.

Sherman Potter was OVI's asbestos abatement supervisor for the R-1 Bay job. Tr. 422. Potter testified that the asbestos-containing pipe covering was removed by means of the "glove bag" method. Tr. 424. In this technique, a seamless "six mil bag," containing rubber-like gloves which extend into the bag, is wrapped around the section of pipe covering to be removed. The glove bag is stapled and then sealed with duct tape to ensure that there are no leaks. A smoke test is performed inside the bag to check whether it is airtight. Water bottles are then used to wet the pipe covering inside the bag. Following this, the pipe covering is removed and the pipe is sprayed with a product known as "22P," in order to encapsulate any asbestos fibers remaining on the pipe. An epivac is used to exhaust the air from the bag, leaving behind the removed RACM. The glove bag is then taken down from the pipe, placed inside another six mil poly bag, referred to as a "burial bag," and sealed. Tr. 424-426. At this point, OVI removes the sealed bags to an on-site dumpster to await shipment to an appropriate disposal site. Tr. 459.

It is undisputed that from November 21, 1996, through at least December 5, 1996, OVI removed asbestos-containing materials from the Ravenswood facility. These asbestos-containing materials included pipe insulation and constituted "friable asbestos material" and "regulated asbestos-containing material" as those terms are defined at 40 C.F.R. 61.141. Jt. Ex. 1.[4]

On December 5, 1996, EPA Inspector Douglas Foster conducted an Asbestos NESHAP (*i.e.*, "National Emission Standards for Hazardous Air Pollutants") compliance inspection of Century's Ravenswood facility.[5] The Asbestos NESHAP includes regulations governing the emission, handling, and disposal of asbestos during demolition or renovation activities. The Asbestos NESHAP regulations were promulgated pursuant to Sections 112 and 114 of the Clean Air Act. 42 U.S.C. §§ 7412 & 7414.

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[4] The term "friable asbestos material" is defined in part as "any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." The definition of the term "regulated asbestos-containing material" is contained in n.1, *supra*.

[5] Mr. Foster is employed by the National Association of Hispanic Elderly. He performs NESHAP inspections on behalf of EPA pursuant to a grant program. Tr. 22-23.

Inspector Foster was accompanied by an asbestos inspector for the State of West Virginia. Tr. 25, 32. Thomas Nicholson, an environmental specialist employed by Century, and Sherman Potter, OVI's abatement supervisor at the Ravenswood site, also accompanied Inspector Foster. Jt. Ex. 1; Tr. 30, 32-34. At the time of this December 5, 1996, inspection, OVI was engaged in stripping, disturbing, and removing asbestos-containing material from the facility and its components. Jt. Ex. 1. Inspector Foster, however, did not actually observe OVI removing the RACM from the pipes. Tr. 70, 131.

The central events of this case involve the December 5 inspection of the Ravenswood facility asbestos waste dumpster. It is there that the waste material from the R-1 Bay renovation project was taken and stored prior to its off-site disposal. Jt. Ex. 1. The dumpster is a "rolloff" type container, approximately 30 to 40 yards in length, with red danger tape around it and asbestos warning stickers on it. Tr. 35; C.Ex. 7B (photographs 12-14). It is undisputed that at the time of the inspection, there were 43 plastic bags in the dumpster and that each bag contained asbestos waste. (Most of the bags were clear plastic, and all were sealed. Tr. 36-37.) It also is undisputed that Inspector Foster opened six of the bags, photographed their contents, and collected samples from each bag. Jt. Ex. 1; C.Ex. 7B; Resp. Br. at 3.

The six bags from which the samples were taken contained regulated asbestos-containing material, *i.e.*, RACM, in the form of asbestos pipe insulation. Tr. 43. The samples were sent to the Eagle Industrial Hygiene Association, Inc., laboratory where Polarized Light Microscopy analysis showed they contained between 35% and 43% amosite asbestos. Jt. Ex. 1.

Thereafter, EPA initiated the present enforcement action. EPA charges that the RACM observed by Inspector Foster in the Ravenswood dumpster on December 5, 1996, was not adequately wet, a violation of 40 C.F.R. 61.145(c)(6)(i). OVI disputes this charge.

III. Discussion

A. Liability

As a preliminary matter, OVI concedes that EPA has jurisdiction in this case. OVI also concedes that asbestos is recognized as a hazardous air pollutant pursuant to Section 112 of the Clean Air Act, and that the amount of RACM removed at the Ravenswood facility exceeded the minimum threshold amounts contained in 40 C.F.R. 61.145(a)(4), thus triggering the Asbestos NESHAP workplace practices contained in 40 C.F.R. Part 61. Jt. Ex. 1; OVI Br. at 8. One such NESHAP work practice is contained in Section 61.145(c)(6)(i). This section requires that RACM removed during renovation be kept "adequately wet" until collected for disposal. This is the Asbestos NESHAP work practice which EPA claims that OVI violated.

Thus, the issue in this case is squarely presented, *i.e.*, whether the regulated asbestos-containing material observed in the Ravenswood facility dumpster by Inspector Foster on

December 5 was adequately wet, as required by 40 C.F.R. 61.145(c)(6)(i). If the RACM is found to have been adequately wet, then OVI prevails and the complaint must be dismissed; if not, then EPA prevails and OVI is in violation of the Clean Air Act.

Section 61.145(c) is titled, "Procedures for asbestos emission control," and, as noted, it contains various Asbestos NESHAP work practices. Among other things, these work practices include the handling and disposal of asbestos by the owner or operator of a demolition or renovation activity. Insofar as this case is concerned, Section 61.145(c) provides:

> (6) For all RACM, including material that has been removed or stripped:
>
> (i) *Adequately wet* the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150 ….

40 C.F.R. 61.145(c)(6)(i) *(emphasis added)*.

The evidence in this case supports the position advanced by EPA, *i.e.*, that on December 5, Inspector Foster observed regulated asbestos-containing material that was not adequately wet. In fact, the evidence shows that the RACM was dry. Thus, EPA has carried its burden of proof and has established a violation of Section 61.145(c)(6)(i).

The result here is compelled by the testimony of Inspector Foster, specifically his eyewitness account as to the physical condition of the RACM. In that regard, Foster's account is critical because he was the only person to actually observe, as well as touch, the RACM in the Ravenswood dumpster. While other witnesses (for both EPA and OVI) offered their opinion as to either the wetness, or dryness, of the RACM in the dumpster on December 5, their testimony on this point is not entitled to any weight because it is based upon inconclusive photographs of the asbestos-containing material.[6] For this reason, Inspector Foster's eyewitness account is accorded considerable weight and, as explained below, it is sufficient to support a finding that OVI failed to keep the RACM adequately wet, after its removal and prior to its disposal, as required by Section 61.145(c)(6)(i).

Before reviewing the details of this eyewitness account, however, it is worth noting that Mr. Foster is an experienced Asbestos NESHAP inspector. He conducts about 125 Asbestos NESHAP inspections annually. Overall, Inspector Foster has conducted approximately 1,000 such inspections for EPA. Tr. 23-24. In fact, insofar as this case is concerned, respondent

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[6] Indeed, OVI submits: "Photographs of the insulation material contained in the six (6) waste bags by Inspector Foster are, at best, inconclusive regarding the issue of whether the material was 'adequately wet' as defined by 40 C.F.R. § 61.141." OVI Br. at 9.

OVI does not challenge the professional credentials of Inspector Foster; nor does it challenge the manner in which the Ravenswood facility inspection was conducted on December 5. Rather, OVI's contest is limited to the inspector's conclusion that the regulated asbestos-containing material in the dumpster on December 5 was dry.

Regarding that conclusion, Inspector Foster was unequivocal in his testimony that the RACM in the dumpster was dry. First, the inspector stated that while in the dumpster he picked up at least ten asbestos waste bags and that all of the bags were light. This indicated to Foster that the RACM inside the bags was dry. According to the inspector, if the RACM had been adequately wet, the asbestos waste bags would have been significantly heavier. Tr. 37-38, 168. In that regard, an OVI witness testified that bags containing wetted RACM from the R-1 Bay would weigh between 30 and 40 pounds. Tr. 485. Clearly, that wasn't the case when Foster lifted the bags.

Further proof that the RACM was dry is the fact that when Inspector Foster felt the outside of the bags, the asbestos-containing material inside was not "mushy," as would have been the case had the material been wet. In addition, Foster felt the sides and bottom of the asbestos waste bags for water, but found none. Tr. 38-39.

Second, Inspector Foster randomly selected six of the bags, cut them open, and visually inspected the RACM as he collected samples. Tr. 40. In each of the six asbestos waste bags, Foster found "dry powdery pipe insulation." Tr. 43. The material "felt dry" and "there was no moisture in it." *Id.* Also, there was no moisture on the inspector's gloves as a result of his handling the RACM, and there was no evidence of water when he looked into the bags. Tr. 43-44. In fact, as Foster collected his samples he squeezed the material and it fell apart in his hand. This regulated asbestos-containing material was, in Foster's words, "friable and powdery." Tr. 45, 50-51, 54. In sum, in each of the six asbestos waste bags opened, Inspector Foster found no sign of moisture in the RACM, no sign of condensation on the inside of the plastic waste bags, and no sign of a wetting agent having been applied. Tr. 44, 54.

In addition to physically inspecting the RACM and collecting samples, Inspector Foster also took photographs of this material. These photographs are contained in Complainant's Exhibit 7B. At the hearing, Foster reviewed these photographs and testified that they show the RACM to be dry and powdery. Tr. 48-59. Another EPA witness, Richard Ponak, an environmental scientist employed by the agency, similarly testified that these photographs showed that the asbestos waste material was dry and crumbly. Tr. 234-237.

Insofar as the Exhibit 7B photographs are concerned, however, respondent's witnesses were of a different opinion. Sherman Potter, the OVI on-site asbestos abatement supervisor, and Ronald Kinniard, an OVI asbestos abatement worker, testified that the photographs taken by Inspector Foster show the presence of water. Tr. 452, 454-457, 520-523.

Despite the fact that the witnesses for both sides are convinced that the photographs contained in Exhibit 7B support their respective positions, a review of these photographs show them to be inconclusive as to whether the RACM was wet or dry. These photographs simply do not show, with any reasonable assurance, the condition of the asbestos-containing waste material as it existed on December 5. Accordingly, the witnesses' testimony regarding the photographic evidence is not entitled to any weight.

Aside from these photographs, OVI attempted to counter the testimony of Inspector Foster with the testimony of its employees, Potter and Kinniard. In that regard, Potter testified that the amosite asbestos pipe covering found in the dumpster was difficult to wet. (This statement was disputed by Foster, who stated that the pipe insulation wets "very easily." Tr. 142.) Potter further testified that because the pipe was hard to wet, the asbestos abatement crew used the wetting agent "EPA 55" when removing the asbestos-containing covering in the R-1 Bay. Potter also stated that because the pipe covering was old, it absorbed the wetting agent like a "sponge" and that it would "wick the water from the bag" after it was collected and was awaiting disposal. Tr. 421-423, 513.

Kinniard echoed Potter's testimony regarding the use of a wetting agent during the removal of the RACM from the pipes. Kinniard was involved in the actual abatement work at the Ravenswood facility.[7] He stated that the "glove bag" method was used to remove the pipe covering and that during this removal process 1-1/2 gallons of EPA 55 were used to wet each 4-foot section of pipe covering. Tr. 503-508, 517.

Despite the testimony of both Potter and Kinniard that OVI adequately wet the RACM during its removal at the Ravenswood facility, the fact remains that Inspector Foster observed and felt dry and powdery asbestos pipe covering when he opened six of the asbestos waste bags in the dumpster. Also, the inspector handled up to ten bags and was able to determine by their weight and composition that the RACM inside the bags was dry.[8] The testimony of Potter and Kinniard focused upon the abatement methods generally used by OVI in removing the pipe covering. Their testimony concerning the practice of OVI in removing RACM does not diminish in any way the testimony of Inspector Foster as to the dry and crumbly asbestos-containing material he found in the Ravenswood dumpster on December 5.

Moreover, what is striking about the testimonial evidence in this case is the fact that although present at the dumpster during EPA's December 5 inspection, Potter offered no testimony, one way or the other, as to the condition of the RACM at that critical time. *See*

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[7] Although Potter was present during the abatement process, he was not on the lift when the asbestos-containing covering was removed from the overhead pipes. Tr. 424, 446.

[8] On direct examination, the inspector testified that he lifted 15 bags containing pipe covering. Tr. 38. He could tell the contents of these bags by the curvature of the material. On cross-examination, the inspector revised this number downward to ten bags. Tr. 168.

Tr. 486, 491. Nor did OVI call as a witness, Thomas Nicholson, the Century employee who was present at the Ravenswood dumpster during this December 5 inspection. Indeed, it is significant that only Inspector Foster testified as to the condition of the RACM. OVI presented no witnesses to dispute the observations made by Foster during the pivotal inspection. In fact, both the OVI representative (Potter) and the Century representative (Nicholson) remained outside the dumpster while Inspector Foster cut into the bags and collected his samples. Tr. 60.

Finally, the OVI Daily Job Report prepared by Potter on December 5, 1996, lends further support to the testimony of Inspector Foster. After noting that the EPA inspector was on site "to inspect the bags for water content," Potter's report goes on to state, "Men return to work area. Bags are hauled to disposal dumpster. *They are also adding water to bags in dumpster*." Resp. Ex. Q at 9 *(emphasis added)*. Thus, despite the fact that Potter testified that he was not informed by Inspector Foster that the bags were not adequately wet (although Foster testified to the contrary (Tr. 64)), and that he had no reason to look at the bags that Foster had inspected, this OVI Daily Job Report suggests that Potter's recollection is incorrect. *See* Tr. 460, 491. Rather, these facts add support to EPA's contention that water was added to the bags because the RACM was dry.

Aside from a consideration of the pipe covering itself, OVI raises a defense in the form of air monitoring results. It contends that air monitoring conducted inside the Ravenswood facility shows that the regulated asbestos-containing material was kept adequately wet at all times. In that regard, OVI submits that on the basis of this air monitoring "there was no evidence of any release of any airborne fibers." Resp. Br. at 6. Respondent apparently reasons that the absence of any airborne asbestos fibers means that it couldn't have violated the Asbestos NESHAP at issue in this case. Respondent is wrong.

First, as OVI admits, EPA regulations do not require that such air monitoring be conducted; nor is there any evidence that EPA considers air monitoring results to determine Asbestos NESHAP compliance. Rather, the monitoring that took place inside the Ravenswood facility was conducted pursuant to regulations issued by the Occupational Safety and Health Administration ("OSHA"). The air monitoring conducted by OVI may well be relevant to determining compliance with OSHA regulations, but respondent has failed to show how this air monitoring is relevant to this Clean Air Act case. Specifically, respondent has failed to show that the fact that monitoring did not reveal airborne fibers means that the RACM stored in the Ravenswood dumpster was adequately wet.

Second, the air monitoring results relied upon by OVI are not powerful enough to defeat the solid testimony of Inspector Foster that he observed dry RACM. Again, Foster is the only witness to actually observe and touch the asbestos-containing pipe covering.

Third, as argued by EPA, the air monitoring results upon which OVI relies weren't even from the R-1 Bay. In fact, OVI concedes the point that the air monitoring was conducted

"in areas of the plant other than the R-1 Bay." OVI Rep. Br. at 7. For these reasons, OVI's air monitoring argument must fail.

Accordingly, it is held that OVI failed to keep regulated asbestos-containing material adequately wet until collected for disposal as required by 40 C.F.R. 61.145(c)(6)(i). This failure constitutes a violation of Section 112 of the Clean Air Act. 42 U.S.C. § 7412.

B. Civil Penalty

Section 113(d)(1) of the Clean Air Act authorizes the assessment of a civil penalty for each violation of the Act. 42 U.S.C. §7413(d)(1). It provides for the assessment of a penalty "of up to $25,000, per day of violation." Section 113(e)(1) of the Act sets forth the "[p]enalty assessment criteria," *i.e.*, those factors that are to be taken into account in determining the civil penalty to be assessed for the violation. This section provides:

> … [T]he Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence …, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1).

As noted, EPA proposes that a $28,520 penalty be assessed against OVI for the violation found in this case.[9] In calculating this penalty proposal, EPA relied exclusively upon the "Clean Air Act Stationary Source Civil Penalty Policy" (C.Ex. 22) and "Appendix III Asbestos Demolition And Renovation Civil Penalty Policy" (C.Ex. 23). EPA submits that these policy documents implement the penalty criteria of Section 113(e). EPA Br. at 39.

As with liability, EPA bears the burden of proof with respect to the penalty. In determining the penalty to be assessed here, the Section 113(e) penalty criteria is the yardstick by which the evidence is measured. *See Employers Ins. Of Wausau,* 6 E.A.D. 735, 758

[9] In its brief, EPA states that in light of the evidence presented at the hearing "a penalty as high as $62,900 could be assessed against OVI." EPA Br. at 45 n.19. Despite this assertion, however, the monetary sanction requested by complainant is "an amount no less than the remaining $28,520." EPA Br. at 100.

(1997). Accordingly, upon consideration of the evidence presented in this case, OVI is assessed a civil penalty of $20,000. This penalty assessment is explained below.

Seriousness of the Violation

For purposes of this case, the most critical penalty factor is the "seriousness of the violation" criterion. This factor encompasses any environmental harm and human health risks resulting from respondent's NESHAP violation, as well as the potential for such harm.[10] It also includes the degree to which OVI was negligent in failing to comply with the Asbestos NESHAP work practice provisions. The evidence here establishes that the violation committed by OVI was of a serious nature. This fact carries considerable weight in determining the penalty amount.

The seriousness of this violation is perhaps best illustrated by the fact that, pursuant to Section 112 of the Clean Air Act, EPA has listed asbestos as a hazardous air pollutant. 42 U.S.C. § 7412. As such, it is well beyond dispute that this hazardous air pollutant poses significant health risks. EPA correctly points out that asbestos is a known human carcinogen and that exposure to this substance can result in "asbestosis," a nonmalignant, progressive pulmonary impairment caused by the retention of inhaled asbestos in the lungs and resulting in the scarring of lung tissue. 38 Fed. Reg. 8820 (1973). *See* 47 Fed. Reg. 23360 (1982) ("Extensive epidemiologic evidence demonstrates that inhalation of asbestos can lead to pleural and peritoneal mesothelioma, lung cancer, asbestosis, and other diseases which are serious, irreversible, and often fatal."); *see also, Orleans Parish Sch. Bd. v. Asbestos Corp.*, 114 F.3d 66, 69 (5th Cir. 1997); *In Re: Henrico County Public Schools,* 2 E.A.D. 567 (1988). In fact, Congress has made an express finding that "medical science has not established any minimum level of exposure to asbestos which is considered to be safe to individuals exposed to the fibers." 20 U.S.C. §§ 4011(a)(1) & (3).

In addition, the actions of the individuals involved in this case also illustrate well the dangers presented in removing asbestos-containing material during renovation. For instance, when the OVI asbestos abatement workers removed the RACM from the overhead pipes, they did so wearing protective clothing and using the glove bag method. Tr. 506-508. Respondent's witnesses also spoke of the need to control the asbestos fibers by wetting the RACM prior to its removal and encapsulating any fibers remaining on the pipe. Tr. 512-517, 534. Furthermore, after carefully placing the removed RACM into either double-lined, or triple-lined, "poly" bags, the OVI workers carried the bags to a dumpster specially marked with "red danger tape" and signs warning that it contained hazardous material. Tr. 35; C.Ex.

[10] In this case, EPA found no evidence of "direct environmental damage." Tr. 258-259. As explained above, however, this fact does not prevent the assessment of a substantial civil penalty.

7B. In fact, each asbestos waste bag had its own OSHA label containing an asbestos warning. Tr. 36.

The actions of EPA Inspector Foster in this case likewise demonstrate the danger presented by asbestos-containing material. For example, prior to entering the dumpster to collect samples during his December 5 inspection, Foster put on protective clothing, which included a tie-back suit, respirator, and gloves. Tr. 41, 44; C.Ex. 7B. The safety precautions taken by Inspector Foster, as well as by the OVI workers, proved to be particularly wise decisions given the fact that the six samples collected in the dumpster by the inspector ranged from 35% to 45% amosite asbestos. Jt. Ex. 1; C.Ex. 9.

Thus, as the facts of this case show, inadequately wet RACM presents a significant danger to the health of the asbestos abatement worker and to any Federal or State inspectors on the abatement site. This case also shows the danger presented to the general public. For example, Foster explained that the asbestos waste bags containing inadequately wet RACM in the Ravenswood dumpster would have been transported off-site for proper landfill disposal. In the event of an accident during transport, the general public would have been in danger of exposure to asbestos fibers. Tr. 149-150. EPA witness Richard Ponak similarly testified as to the danger presented to the public by the transportation of dry RACM. Tr. 250-251.

The amount of dry RACM involved also has a bearing on the seriousness of the violation, and hence upon the penalty. Here, an OVI abatement worker testified that each asbestos waste bag contained a 4-foot section of the pipe covering. He essentially testified that a 4-foot section was all that could fit into a bag. Tr. 505. This testimony as to the fact that each waste bag contained a 4-foot section of RACM is credited. Although EPA witness Ponak testified that there was more than four feet of pipe insulation in each bag, unlike the OVI witness, his testimony was not based upon an eyewitness account. In fact, Ponak did not even visit the Ravenswood facility. Instead, Ponak estimated the amount of RACM in the bags on the basis of a review of the photographs taken by Inspector Foster. Tr. 406.

Next, while it is undisputed that the dumpster contained 43 bags of regulated asbestos-containing material, EPA has established that, at best, only 16 of those bags contained RACM that was not adequately wet. These are the six bags which the inspector sampled, and the ten bags which he lifted. Tr. 38, 40. There is no indication as to whether the RACM in the remaining bags was wet or dry.[11]

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[11] This is not to say that EPA couldn't show the extent of an Asbestos NESHAP violation by way of circumstantial evidence. For example, in a given case, a random, but representative, area sampling of asbestos waste bags might well be sufficient to prove that the extent of the violation included regulated asbestos-containing material not physically inspected by the EPA representative. Those, however, are not the facts here. In this case, Inspector Foster's investigation of the bags in the dumpster, although by all appearances properly

Also reflecting upon the seriousness of the involved violation is the degree of negligence of OVI. As argued by EPA, "OVI performed, supervised and controlled the renovation activities at the Facility and actually removed, contained and prepared the RACM … for disposal." EPA Br. at 41. Accordingly, OVI is the party directly responsible for the RACM being stored in the dumpster in a "dry" and "crumbly" condition. These facts support a finding of a high degree of negligence.

While OVI's witnesses testified that they routinely wet the RACM during the removal process, Foster's inspection of the Ravenswood dumpster shows that certainly wasn't the case. For example, Inspector Foster cut into six of the asbestos waste bags and found that they all contained regulated asbestos-containing material that was dry and crumbly. Not one bag contained RACM that was adequately wet. In fact, there was no sign of moisture in any of the bags. Also, the inspector was ten-for-ten in picking up the waste bags and finding that each was too light to have contained adequately wet RACM.[12] Yet, witnesses for both parties testified that adequately wet RACM placed in "poly" bags, and properly sealed, would not dry out even over long periods of time. Tr. 238, 477. Thus, it can be concluded that the RACM was not adequately wet when removed in the first place.

OVI was simply unable to point to any evidence establishing that the RACM in the six bags sampled by Inspector Foster, and the RACM contained in the ten asbestos waste bags that the inspector lifted, was adequately wet. Respondent had a representative who accompanied Inspector Foster, *i.e.*, Potter, but that representative did not accompany the inspector inside the dumpster. Accordingly, respondent could provide no eyewitness account to counter the credible testimony of Inspector Foster regarding the condition of the RACM. Unlike Foster, Potter did not observe the RACM in the six bags from which samples were taken, nor did Potter touch the pipe covering contained in each of those bags. Tr. 491. In addition, OVI's explanation that the removed pipe insulation served as a wick and absorbed the water inside the bag is rejected, given the fact the RACM was so dry that it showed no sign of moisture and even crumbled in the hand of Inspector Foster.

In sum, the evidence in this case establishes that the Asbestos NESHAP work practice violation was serious.

Duration of the Violation

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conducted, was not so comprehensive that one could conclude, with a reasonable degree of certainty, that all 43 bags contained inadequately wet RACM.

[12] As noted, it is not entirely clear whether the six bags that Foster sampled were from the group of ten bags that he lifted, or whether they were in addition to that group. *See* Tr. 40. This uncertainty is not significant because even considering the extent of the violation by the smaller number of bags only, OVI's failure to comply with the Asbestos NESHAP was still substantial and warrants the penalty assessed in this case.

In the complaint filed against OVI, EPA alleged that the asbestos NESHAP violation existed for three days. At the hearing, EPA witness Ponak testified that the duration of the violation was not three days, but twelve days. In its post-hearing brief, however, EPA submits that the violation existed not for twelve days, but for fifteen days – *i.e.*, from November 21, 1996, through December 5, 1996. EPA Br. at 42 & 56. Despite the fact that EPA now believes the duration of the violation to be a longer period of time than alleged in the complaint, it is not seeking a higher penalty. Tr. 306.

Given the facts of this case, it is difficult to tell just how long the bags containing the dry RACM were unlawfully stored in the dumpster. Nonetheless, Inspector Foster believes that the violative period was three days. Tr. 105. In addition, Ponak also offered a view as to why the inspector's three-day determination is supportable. Tr. 297. Based upon the testimony of Foster and Ponak, it is found that the duration of the violation was three days.

Size of the Business

To determine the size of OVI, EPA relied upon a sketchy Dun and Bradstreet report stating that OVI was a "small company," employing between 40 to 80 people. C.Ex. 18. EPA concluded from this report that respondent had a net worth ranging between $100,000 and $1,000,000. In its answer, OVI agreed with this net worth estimate. Ans. ¶ 51. It is therefore found that OVI is a small company.

Economic Impact of the Penalty on the Business

There is almost no evidence in this record regarding the economic impact of a penalty upon OVI's business. Neither party has paid much attention to this penalty criterion. In fact, respondent has offered no evidence regarding the economic impact that a civil penalty would have on its business. EPA has shown only slightly more interest, having obtained the 1998 Dun and Bradstreet report, referenced above. Accordingly, it is found that the penalty assessed in this case is not one that would jeopardize respondent's ability to continue in business.

Economic Benefit of Noncompliance

EPA asserts that OVI reaped an economic benefit of $10,400 by failing to comply with the asbestos NESHAP.[13] To calculate this economic benefit, EPA relied upon its Asbestos Penalty Policy. C.Ex. 23. While acknowledging that the policy itself states that "[i]t is difficult to determine actual economic benefit," EPA employed the policy's "rule-of-thumb" that a

[13] In the complaint, EPA alleged an economic benefit of $6,020. Complainant again maintains that the evidence presented at the hearing supports an upward adjustment of this amount.

respondent receives a $20 economic benefit for each linear foot of RACM that is removed in contravention of the Asbestos NESHAP provisions. EPA Br. at 66.

EPA's suggestion that OVI received an economic benefit of $10,400 for failing to wet the RACM removed from the overhead pipes in the R-1 Bay is not supported by the record. There has been no showing by EPA that OVI's failure in this case to keep the regulated asbestos-containing material in sixteen bags (or for that matter all forty-three bags) adequately wet until collected for disposal amounted to such a large economic benefit.

In that regard, the EPA witness who testified as to the economic benefit simply multiplied the $20 figure contained in the asbestos policy document by the amount of RACM which the complainant believed was unlawfully stored in the dumpster. This assessment, however, does not square with the facts of this case. If anything, one would expect OVI's economic benefit for not keeping the removed RACM adequately wet was minimal.

For instance, the EPA witness's testimony that the adequate use of water by OVI in this case would have resulted in the waste bags being heavier, thereby commanding a higher cost for disposal, although a reasonable assumption, without more is simply too general to aid in the determination of respondent's actual economic benefit for noncompliance. *See* Tr. 394. Also, this witness over-estimated the number of linear feet of RACM that was inadequately wet. Tr. 343-344, 368-369. He based his economic benefit calculation on the unsupported belief that all 43 waste bags in the dumpster contained RACM that was inadequately wet. That, however, is a fact that EPA did not prove in this case. Indeed, this very witness admitted that while he was "certain" that six of the bags contained RACM, he didn't know what was in the other 37 bags. Tr. 396, 404. Moreover, on the basis of the testimony of OVI's witnesses, it has been determined that each waste bag contained fewer linear feet of RACM than EPA suspected to be the case.

For these reasons, EPA has not shown that the economic benefit sustained by OVI as a result of its noncompliance with the Asbestos NESHAP was as substantial as it alleged to be the case.

Payment of Penalties for the Same Violation

EPA submits that there is no evidence that OVI previously paid any penalties for violating 40 C.F.R. 61.145(c)(6)(i), the regulation at issue here.

Full Compliance History and Good Faith Efforts to Comply

In *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522 (1998), the Environmental Appeals Board ("EAB") stated that the "full compliance history" penalty factor of Section 113(e) of the Clean Air Act "would appear to authorize a broad inquiry, including both a history of violations as well as notices previously given to the respondent regarding alleged

violations." *Id*. at 543. Accordingly, the EAB held that "imposition of a penalty increase based on a prior notification of an alleged violation, even if there is no adjudication of liability for the violation, promotes the statutory purpose of assuring that violations will not occur." *Id*. at 547. The Board held that under such circumstances a party would be held to a "heightened awareness" of its obligation to comply with the statute and that this awareness, in turn, could be a proper basis for a penalty increase.

Relying upon the *Ocean State* case, EPA submits that OVI's "full compliance history" warrants an upward adjustment to any civil penalty to be assessed against respondent. In that regard, EPA relies upon four documents to support its requested penalty surcharge. As explained below, however, EPA fails to show that any of the events recited in the four exhibits fall within the coverage of *Ocean State*.

The first document is Complainant's Exhibit 13. This is a letter dated March 19, 1996, from the State of West Virginia, Division of Environmental Protection, to OVI. In the letter, the State informed respondent that the company's notification of an asbestos removal project at St. Mary's Hospital in Huntington, West Virginia, was deficient in three areas. It appears that this letter was nothing more than an administrative notification to OVI that the company could not begin the St. Mary's project until more information was provided. EPA has not shown that, like the situation in the *Ocean State* case, this letter to OVI was part of an enforcement action or a notice to respondent that it was in violation of the law. In short, EPA has failed to show how this State informational letter to OVI warrants an upward penalty adjustment under the Board's "heightened awareness" holding in *Ocean State*.

The next three exhibits relied upon by EPA are related. Exhibit 14 is an administrative complaint filed by EPA against OVI and a co-respondent. It is dated September 30, 1994. The complaint charges that the respondents failed to keep RACM adequately wet during stripping and until collected for disposal in violation of 40 C.F.R. 61.145(c)(3) and 61.145(c)(6(i). Exhibit 15 is a Consent Agreement signed by EPA and the respondents settling this matter. This Consent Agreement states, in part, "Respondents *neither admit nor deny* the Findings of Fact and the factual allegations contained in the Complaint and in this Consent Agreement." ¶ 3 *(emphasis added)*. The Consent Agreement further states, "Respondents *do not admit, and specifically deny,* the Conclusions of Law and legal determinations contained in the Complaint and in this Consent Agreement." ¶ 4 *(emphasis added)*. Exhibit 16 is a photocopy of the check paid by respondents to EPA in settlement of that matter.

With respect to the present case, EPA again fails to show how these exhibits mandate a higher civil penalty under *Ocean State*. The *Ocean State* case involved the existence of an earlier violation from which it could be determined that in committing a subsequent violation the respondent was already on notice as to what was required by the Asbestos NESHAP and simply should have known better. Hence, the "heightened awareness" of the respondent. In Exhibits 14, 15, and 16, however, the closest that EPA can come to showing the existence of an earlier violation is the respondents' reference to the payment of a penalty in settlement.

Yet, considering the context of OVI's clear denial of having committed a violation in the earlier matter, this court is unable to find the underlying violation that seems to be required by *Ocean State*. Thus, because EPA settled the earlier case in a manner which allowed the respondents to deny the fact of violation, it does not appear to be a proper basis under *Ocean State* for an upward adjustment of the civil penalty in this matter.

Other Factors As Justice May Require

Neither party has brought to the attention of this court, for purposes of penalty consideration, any other factors as justice may require. There has been no adjustment to the penalty pursuant to this statutory criterion.

ORDER

Accordingly, it is held that the Ohio Valley Insulating Company, Inc., violated Section 112 of the Clean Air Act, 42 U.S.C. § 7412, and 40 C.F.R. 61.145(c)(6)(i). Pursuant to Sections 113(d) & (e) of the Act, respondent is assessed a civil penalty of $20,000. 42 U.S.C. §§ 7413(d) & (e). Furthermore, respondent is directed to pay this penalty within 60 days from the date of this order.[14] Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, this decision will become a final order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

[14] Payment is to be by cashier's or certified check, made payable to the Treasurer of the United States of America, U.S. EPA Region 3 (Regional Hearing Clerk), Mellon Bank P.O. Box 360515, Pittsburgh, PA 15251.